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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

ED MARTIN,

Plaintiff and Respondent,

v.

WILLIAM SIEGEL et al.,

Defendants and Appellants.

F070170

(Super. Ct. No. 14C0082)

**OPINION**

**THE COURT**[*]

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Griswold, LaSalle, Cobb, Dowd & Gin, Robert M. Dowd and Mario U. Zamora for Defendant and Appellant William Siegel.

Farley Law Firm and Michael L. Farley for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Peña, J. and Smith, J.

## INTRODUCTION

Respondent Ed Martin filed a complaint for defamation per se against appellant William Siegel and the City of Lemoore. Appellant filed a motion to strike pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP motion).[1] Respondent filed opposition and appellant filed a reply. The trial court denied the motion and appellant appealed. We affirm.

## BACKGROUND

In his complaint, respondent alleged he is a former mayor of the City of Lemoore and currently an assistant principal at Lemoore Union High School. Appellant is alleged to be the duly elected mayor of the City of Lemoore and performed the acts complained of in the complaint in his official capacity as mayor of the City of Lemoore. Respondent alleged that in May 2013, appellant contacted Lemoore Union High School District Superintendent Debbie Muro and requested that respondent be terminated from his position at the high school. On September 1, 2013, appellant sent respondent an e-mail, which was attached as an exhibit to the complaint, that referenced respondent's "homosexual tendencies," "infatuation with young boys" and "self termination." Respondent alleged that all of these assertions are false and libelous on their face. The complaint identified by name and position several persons to whom appellant published the e-mail and it was alleged that those persons read the e-mail. The complaint alleged that appellant acted with malice and knew the statements were false or recklessly disregarded their falsity, thereby justifying an award for general, special and punitive damages.

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[1] Unless otherwise indicated, further statutory references are to the Code of Civil Procedure.

The subject e-mail is dated September 1, 2013, and reads as follows:

"Dear Ed Martin,

> "It makes me sad that people consider you as a clown. I hope Mr. Simonson has given you some ideas to help you understand your [i]nconsequential life, and as you seem to be obsessively infatuated with my life I assure you that I hold you in the same regards as the company you keep. It is my opinion that you have a serious chemicals [*sic*] imbalance. People in the community speak of your homosexual tendencies and your infatuation with young boys. This, while bothersome and disturbing, is a concern. I want you to know that I do not judge or condemn you for your actions. I ignore the rumors of your moral turpitude as much as I ignore the nonsense you print in the emails you send. I hope that you will find happiness in life and will never consider self termination again. If you need help and feel that the city council can do anything to help you find solace, please reach out to us. We are here to serve and will always find a way to help those in need. We look forward to assisting and guiding you on a path away from your troubled journey.
>
> "William Siegel
> "Mayor
> "City of Lemoore"

Appellant filed an answer to the complaint generally denying the allegations and setting forth several affirmative defenses, including his assertion that the statements are true and that he did not publish the statements about a "public figure" with malice.

Several weeks later, appellant filed the subject anti-SLAPP motion, alleging that the defamation action arose from an act in furtherance of appellant's right to free speech made in connection with a public issue and that respondent could not establish a probability of success because each of appellant's statements was either opinion or not a statement able to be proved as false or true. Appellant's declaration in support of the motion alleged that respondent wrote approximately one article per week in his weekly newspaper pertaining to appellant, that the topics covered recalling appellant as mayor, appellant's alleged intimidation of recall proponents, his alleged violation of campaign rules, etc. His declaration also indicated that through a series of conversations between

appellant and Bill Henry, between June 2013 and early 2014, Mr. Henry told him that people in the community believed respondent was homosexual and had an infatuation with young boys. He also asserted that he believed Mr. Henry's comments to be true based upon conversations with Joe Simonson regarding respondent's possession of pornographic material. He also explained the basis for his statement in the e-mail that respondent was a "clown."

Appellant's lawyer filed a declaration in which he attached numerous published articles in "The Leader" publication since June 2013 relating to appellant, including several editorials and critical opinions by others of appellant.

In opposition to the motion, respondent submitted a declaration denying that he has ever had a chemical imbalance, been a homosexual, had an infatuation with young boys, or ever attempted suicide or any other form of "'self-termination.'" He asserted that his sexual orientation was not then or had ever been a subject of public hearings or public debate. He confirmed that in September 2013, he received an e-mail from the superintendent of the high school district informing him that in May 2013, appellant, in his capacity as mayor, reported to her that respondent had an "IRS complaint" and he should be fired from his job. Respondent declared that there was not then or had there ever been an IRS complaint filed against him. He also stated that appellant filed a police report with the Kings County District Attorney's Bureau of Investigation in January 2014, but no criminal charges were ever filed, and there was never any basis for appellant to file such a police report against him.

## DISCUSSION

### *Defamation*

Defamation is effected by libel or slander. (Civ. Code, § 44.) Libel is a false, unprivileged *writing* or fixed representation to the eye, which exposes a person to hatred, contempt, ridicule, or obloquy or which causes said person to be shunned or avoided or which has a tendency to injure him in his occupation. (Civ. Code, § 45.) Slander is a

false, unprivileged *oral* publication. (Civ. Code, § 46.) The basis for respondent's defamation claim is the written e-mail which, if proven, constitutes a libel rather than a slander.

A defamation per se cause of action requires a plaintiff to prove that a defendant published a false statement to another person or persons, that those persons reasonably understood the statements to be about the plaintiff, that the statements were defamatory on their face (without the necessity of explanatory matter), and that the defendant failed to use reasonable care to determine the truth or falsity of the statement. (Civ. Code, §§ 45, 45a; CACI No. 1704.) False statements charging the commission of a crime or tending to directly injure one in his or her profession by imputing dishonesty or questionable professional conduct are defamatory per se. (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 383.) The complaint alleged these elements.

***Standard of Review***

A reviewing court reviews the order granting or denying the motion to strike de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) A reviewing court considers the pleadings, the supporting and opposing affidavits, and accepts as true the evidence favorable to the plaintiff and evaluates the defendant's evidence to determine if it has defeated that submitted by the plaintiff as a matter of law. (*Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 52.)

***Anti-SLAPP Motions***

A cause of action against a person arising from an act in furtherance of that person's right of petition or free speech in connection with a public issue is subject to a special motion to strike unless the court determines the plaintiff has established that there is a probability the plaintiff will prevail on the claim. (§ 425.16, subd. (b)(1).) A complaint that is subject to being stricken under section 425.16 is known as a strategic lawsuit against public participation (SLAPP). Thus, section 425.16 is referred to as the

anti-SLAPP statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*).)

In ruling on an anti-SLAPP motion, the court first decides whether the moving party has shown that the lawsuit arises from protected activity. If the court concludes that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing. (*Equilon*, *supra*, 29 Cal.4th at p. 67.) In deciding the probability of prevailing issue, the plaintiff need only show "'"that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."'" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis West*); (*Burrill v. Nair*, *supra*, 217 Cal.App.4th at pp. 378–380.)

Acts in furtherance of a person's right of petition or free speech include conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. (§ 425.16, subd. (e)(4).) Whether statements have been made in connection with a public issue include whether the statement or the activity precipitated in the claim involve a topic of widespread public interest. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.)

***Analysis of Appellant's Contentions***

Appellant advances several arguments in support of his contention that his anti-SLAPP motion should have been granted.

Appellant argues that the defamation cause of action arises from protected activity because the content of the e-mail involved matters of public interest. We disagree. None of the evidence presented by appellant supports the claim that the referenced e-mail statements (homosexual tendencies, infatuation with young boys and self-termination) pertain to issues involving the public interest or a public issue. Evidence that respondent wrote many articles critical of appellant's performance as Mayor of Lemoore does not give appellant legal immunity to defame respondent about personal matters. The e-mail's

content did not concern appellant's performance as Mayor nor did it relate to any articles respondent wrote about appellant. Instead, they appear to be personal comments directed at respondent rather than addressing any public issue.

Appellant further argues that the e-mail statements are protected speech because the credibility and trustworthiness of respondent is a public concern. However, he fails to explain how statements about homosexual tendencies or a past suicide attempt affects credibility or trustworthiness.[2]

Even assuming *arguendo* that the e-mail furthers the free speech rights of appellant, respondent's evidence has established a probability of prevailing, which defeats the motion. That evidence includes respondent's declaration in which he stated the subject e-mail statements about him are false; there have never been any public hearings or debate about his sexual orientation, alleged infatuation with young boys or alleged attempt at suicide (self-termination); the school superintendent informed him that appellant told her respondent had an IRS complaint and that such claim was false; the superintendent told him appellant told her respondent should be fired; and appellant filed a police report against him, which had no basis and never resulted in any charges being filed.

Appellant contends that respondent is a "public figure" and therefore has the burden of proving both that the challenged statement was false and that the statement was made with actual *malice*. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279–280.) When an individual voluntarily injects himself into a particular public controversy,

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**2** For this reason, his reliance on *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138 is misplaced. There, the court held that "statements posted to the Ripoff Report Web site about [the plaintiff's] character and business practices plainly fall within the rubric of consumer information about [the plaintiff's] business and were intended to serve as a warning to consumers about his trustworthiness." (*Id.* at p. 1146; *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.* (2013) 946 F.Supp.2d 957, 969.) Here, appellant fails to connect statements about homosexual tendencies and suicide with credibility and trustworthiness.

he or she becomes a public figure for a limited range of issues. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351.) Respondent disagrees that he is a public figure. Regardless, even if respondent is a limited public figure for purposes of the First Amendment, we agree with the trial court that respondent has made a prima facie showing of facts sufficient to sustain a favorable judgment that appellant maliciously defamed respondent if the evidence submitted by respondent is credited. (*Oasis West, supra,* 51 Cal.4th at p. 820; *Burrill v. Nair, supra,* 217 Cal.App.4th at pp. 378–380)

Appellant argues that because his e-mail statements about homosexual tendencies and infatuation with young boys were mentioned as coming from "people in the community," the statements are only libelous, that is, false, if people in the community did not make such statements. We agree with the trial court that libelous comments, even though couched in language that "[p]eople in the community speak of," did not convert the defamation into opinion, nor did it permit appellant to establish the truth of the statement by simply proving that people in the community had spoken of respondent in a libelous way. (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26–27 [when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor].)

Finally, appellant complains about two evidentiary rulings. Inasmuch as this court reviews the denial of an anti-SLAPP motion de novo (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3), we review the supporting and opposing evidence de novo and limit our consideration of such evidence to what we deem to be admissible evidence.

The first item of evidence to which appellant contends was inadmissible concerns respondent's declaration that "My credibility is not currently, nor has ever been, a subject of public hearings or public debate." Appellant's objection pursuant to Evidence Code section 702 (personal knowledge of witness) was overruled. We consider this portion of respondent's declaration to be irrelevant in ruling on the anti-SLAPP motion. Appellant

argues that the e-mail's content relates to respondent's credibility. As already mentioned appellant has failed to explain how statements about homosexual tendencies or a past suicide attempt are germane to one's credibility.

The second evidentiary ruling pertains to Ms. Muro's declaration, in which she related a conversation with appellant in which appellant allegedly told her that respondent "should be fired." Appellant objected on hearsay grounds, but the trial court overruled the objection citing the state of mind exception to the hearsay rule (Evid. Code, § 1250). Appellant contends the state of mind exception did not apply. Regardless, the statement (respondent should be fired) is not hearsay because respondent certainly did not offer it for the truth, but rather to show malice on the part of appellant.[3] A reviewing court may uphold a lower court decision on a ground different from that relied upon by the trial court. (*ASP Properties Group, L.P., v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1268; *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

## DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

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[3] Even if it was offered for the truth it would be admissible under Evidence Code section 1220 (admission of party).